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No. 91-209

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOWARD H. GILBERT, JR., ET AL.,
PETITIONERS,

v.

CITY OF CAMBRIDGE AND
CAMBRIDGE RENT CONTROL BOARD,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This reply is submitted to address respondents' opposition to the petition for certiorari.

I. The First Circuit Decided The Constitutional Issues On The Merits

The Court should not be distracted by respondents' argument that the First Circuit's analysis of procedural questions renders this case unworthy of review. Respondents obscure the First Circuit's decision — and the questions presented by the petition — in arguing that the First Circuit did not hold the Ordinance constitutional under the Just Compensation Clause, but merely decided that such a holding would be premature.[1] They also mistakenly contend that, because of the First Circuit's procedural analysis, petitioners have abandoned their as-applied claims and seek review only of their facial claims.

The fallacy in respondents' argument is that the First Circuit decided the constitutional issues on the merits in order to classify the Ordinance in such a way as to give life to respondents' claimed procedural defenses. The First Circuit's procedural analysis would have been impossible had the First Circuit not (a) rejected petitioners' analysis that the Ordinance authorizes a permanent physical occupation (A-14) — for which compensation is required under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) — and (b) classified the Ordinance as a mere use regulation (A-8). The constitutionality of use regulations ordinarily depends on the property owner first pursuing regulatory processes to conclusion to see how far the regulation goes and whether they prevent a viable economic use. *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 348-49

[1] Respondents concede, however, that the First Circuit held the Ordinance constitutional under the Due Process Clause (Opposition p.4).

(1986); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 199-200 (1985).[2]

Treating the Ordinance as a mere use regulation, the First Circuit thus held (a) the presence of a permit system renders the Ordinance facially valid, (b) an as-applied challenge can only be made in the context of a permit denial, and (c) an as-applied challenge can succeed only if viable economic uses are prevented, which in the First Circuit's view turns not on whether tenancies are mandated against an owner's will but on whether one's income from controlled rents is insufficient (A-7-9).[3] But the economic considerations that prompted this Court to judge use regulations only in the context of a permit denial are not a factor in judging laws that authorize a permanent physical occupation. This is because such laws do not rise or fall on the extent of economic impairment and they present no "difficult line-drawing problems." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982). Thus, the First Circuit could only have made economic impairment material, and the status of permit applications significant, by ruling on the merits that the Ordinance does not authorize a permanent physical occupation.[4]

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[2] This also explains *Pennell* v. *City of San Jose*, 485 U.S. 1, 10 (1988), where this Court could not consider the economic impact of a rent adjustment regulation until the local rent board applied the regulation.

[3] The First Circuit's mistaken view of the Ordinance as a use regulation accounts not only for its dismissal of the as-applied claims of those petitioners who have never applied for permits, but also its dismissal, on statute of limitations grounds, of the as-applied claims of those petitioners whose permit applications were denied more than three years before suit. As the First Circuit saw it, since a use regulation can only be challenged in the context of a permit denial, a permit denial is the discrete event that causes the constitutional deprivation and hence starts the running of a limitations period (A-10). But see n.4 *infra* and accompanying text.

[4] The permit process in the Ordinance serves a different function from permit processes in use regulations. Use regulations typically leave property owners many options in the use of their property, but specify that certain uses will require a permit. By contrast, the Ordinance restricts property owners to only one use — rental housing — and prevents any other use whatsoever

A test of whether the First Circuit's decision was substantive or merely procedural is to examine where the decision leaves petitioners, and what constitutional grounds the First Circuit has left open for future proceedings. Were petitioners to argue the Ordinance is unconstitutional for authorizing a permanent physical occupation without providing compensation, the decision below would be advanced as authority that (a) the Ordinance does not authorize a permanent physical occupation, and (b) any constitutional violation would arise, if at all, not from permanent tenant occupation, but only from a rent level that prevents a viable economic use. Were petitioners to argue that the Ordinance violates the Due Process Clause because it requires petitioners to continue in the rental business against their wish to devote their property to another use, the decision below would be advanced as authority that the Ordinance is valid because of the rationality of the relationship between the ends sought to be achieved and the means selected to accomplish those ends.[5]

At bottom, this case — and the petition for certiorari — is about the permissible extent of municipal power in the specific

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absent a permit. If the Ordinance unconstitutionally authorizes a permanent physical occupation, then the denial of a permit would merely leave petitioners in an unconstitutional status quo, and the granting of a permit would merely restore property rights the government could not have constitutionally expunged in the first place. As such, the permit process is only an administrative remedy, the exhaustion of which is not required in a suit under 42 U.S.C. § 1983. *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 (1982).

[5] Respondents argue that since the Ordinance permits petitioners to sell their buildings as a whole, the Ordinance does not compel petitioners to remain in the rental business against their will (Opposition p. 29). But one of the evils of a permanent physical occupation is that "though the owner may retain the bare legal right to dispose of the occupied space by . . . sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). Further, if the Due Process Clause still entitles an owner to "discontinu[e] the use" of property, *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 540-41 (1923), then it is no answer to say that an owner's only remedy against being forced to stay in business is to sell the property.

context of a mandatory tenancy statute.[6] The First Circuit found it constitutional that Cambridge could require petitioners forever to suffer tenants on their property, and limited petitioners' constitutional remedies solely to situations where the controlled rent level does not yield a viable economic use. Petitioners sought only a declaratory judgment as to their constitutional rights and received one, in the form of an opinion that dismissed the complaint. Petitioners now seek review of the substantive rights adjudicated.

II. This Court's Jurisdiction To Review Substantive Questions Decided By Inferior Federal Courts Requires No Deference To Alternative Procedural Grounds Of Decision

Perhaps recognizing that this Court would regard the First Circuit's decision as a disposition on the merits, respondents argue that since petitioners have not sought review of some of the procedural grounds of decision, this Court cannot render a ruling on the merits of the substantive issues decided below. Respondents misapprehend this Court's jurisdiction. The First Circuit decided important constitutional issues contrary to decisions of this Court, federal circuit courts, and the highest court of New York. The fact that the First Circuit also had procedural reasons for dismissal does not prevent this Court from reviewing substantive questions of federal law decided below, especially where — as here — the decision below disposes of the merits of the constitutional claims.

Respondents' argument confuses certiorari petitions from federal courts with those from state courts. In state court cases, an independent and adequate procedural basis will ordinarily be sufficient to defeat a certiorari petition. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Prac-*

[6] Respondents put words in petitioners' mouth that do not fairly belong there. Contrary to respondents' opposition (p. 27), petitioners are not asking this Court to decide whether rent control is per se unconstitutional.

tice & Procedure § 4021 at 682-83 (1977). But this Court's power under 28 U.S.C. § 1254 to review federal court decisions is plenary. The "lack of technical restrictions is [illustrated] by contrasting certiorari to the court of appeals with certiorari to state courts." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4036 at 9-10 (2d ed. 1988). The powers of this Court, which include, for example, the power:

> to decide a case that has not even been considered by the court of appeals . . . reflect several differences between review of state courts and review of federal courts. One difference is the lack of any historic feeling that the Court owes to inferior federal courts the special respect rightly claimed by partly independent state courts. A deeper difference lies in the Court's ability, as head of a single judicial system, to control the procedure, choice of issues for decision, and final disposition of federal cases in ways that are not open on review of state decisions.

Id. at 19. Thus, "on review of federal courts . . . there is no need to honor independent and adequate procedural grounds." *Id.* at 34. See *Forsyth* v. *Hammond*, 166 U.S. 506, 513-14 (1897) (certiorari jurisdiction vests in Supreme Court comprehensive and unlimited power to review cases in federal courts of appeal "irrespective of any ruling or determination therein").

Statements in the First Circuit's written opinion that characterize its disposition of issues as procedural are not controlling. This Court looks beyond the language of a lower court's opinion and determines for itself precisely the ground on which judgment rests, *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-98 (1956), and, where necessary, whether the lower court's judgment is based on legal error in the resolution of a federal constitutional question. *E.g. Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988)

(because it appeared "reasonably likely that the First Amendment issue was necessary to the decisions below," this Court addressed merits of Free Exercise Clause question, even though judgment was also stated to be on statutory grounds).

Thus, respondents can receive no comfort from statements in the First Circuit's decision, for example, to the effect that the facial claims were unripe or non-justiciable. Respondents mislead the Court when they argue that the First Circuit used these phrases because petitioners "fail[ed] to avail themselves of [the permit procedure] prior to bringing suit" (Opposition p. 18). Some of the petitioners, as respondents concede, did apply for permits before suit was brought, and their facial claims were dismissed for only one reason, the same reason the facial claims of the other petitioners were dismissed: in the reasoning of the First Circuit, constitutional rights are not implicated by government mandated tenancies but only by the deprivation of viable economic uses; and since rent control's promise of a "fair net operating income" is all the Takings Clause requires, it is constitutionally permissible for Cambridge to abolish an owner's right to exclude tenants. This holding could only have been possible because the First Circuit viewed the Ordinance as a use regulation and rejected on the merits petitioners' argument, which was fully briefed, that the Ordinance authorized a permanent physical occupation.

III. *Loretto* And *Charles Wolff Packing* Apply To This Case

Respondents devote little of their opposition to the conflict between the First Circuit's decision and decisions of this court and other appellate courts. And while respondents do not discuss the importance of the Just Compensation Clause issue, respondents give only procedural arguments for contending that the Due Process Clause issues are not significant. To the extent respondents address the traditional factors considered

for granting or not granting certiorari, they essentially argue, incorrectly, that this case is distinguishable from *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923) (see Opposition at 23-29).

Respondents' theory to distinguish *Loretto* is twofold. First, respondents say that the Ordinance permits owner occupancy in "conventional apartment buildings," Opposition at 25, and thus there is no permanent physical occupation by tenants. But the narrow and conditional exception for owner occupancy of a few units does not relieve petitioners of the burden to devote most of their properties permanently to tenant occupancy (*See* Petition at 3 n.2). Even though Mrs. Loretto could occupy any unit in her apartment building, this Court still held that the portions of her building devoted to cable installations were taken.

The second asserted distinction is based on respondents' view that it would not serve petitioners' purposes to strike the portions of the Ordinance mandating tenant occupancy without also striking the Ordinance's sale prohibitions. Thus, respondents say, *Loretto* is inapplicable as dealing with mandatory physical occupation, not with prohibitions on sales. Respondents are wrong. One major reason this Court held as it did in *Loretto* was because of how physical occupations affect an owner's right to "possess, use, and *dispose*" of property, noting that they "empty the right [to sell] of any value." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 436 (1982) (emphasis added). Moreover, Cambridge adopted the sale prohibitions not for any independent reason, but only to give itself greater enforcement powers to preserve tenant occupation (See Opposition at 4-5). If the mandatory tenancy provisions fall, the sale prohibitions would have to fall with them.

Respondents attempt to distinguish *Charles Wolff* by arguing that this Court did not protect an owner's right to dis-

continue using his or her property for a specific business, but merely prohibited states from fixing minimum wages. Respondents read the case incorrectly. In fact, in the same case two years later, the Court reiterated the right of an owner of a business to "stop at will, whether the business be losing or profitable." *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U.S. 552, 568 (1925). The Court repeated its holding that, except where an owner assumes the obligation of continued service as a condition to entering a business, as in the case of a common carrier, "the state is without power to compel the owner and employees to continue." *Id.*

IV. The *Williamson County* Issue Raises Federal Questions That Are More Important Than Whether Respondents' Unprecedented Interpretation Of Massachusetts' Inverse Condemnation Statute Is Correct

Respondents misconceive the importance of the second question presented in the petition: whether *Williamson County* required petitioners first to sue for damages in state court before seeking federal declaratory relief, when applicable Massachusetts cases hold that damages are unavailable. Respondents say this issue should not be reviewed because allegedly it only presents whether respondents' unprecedented interpretation of Massachusetts' inverse condemnation statute is correct, and because this Court should defer to the First Circuit on this point.[7]

The First Circuit did not hold that respondents' reading of

[7] Respondents unfairly take advantage of the First Circuit's statement that petitioners' analysis of Massachusetts law on this question placed "paramount reliance" on a pair of cable television cases. In fact, in the briefs below, petitioners relied more on the cases cited in the petition than on the pair of cable television cases. Petitioners relied on the cable television cases to show the First Circuit that, having had the opportunity to adopt respondents' interpretation of the inverse condemnation statute and thereby avoid striking Massachusetts' cable television statute as unconstitutional, the Supreme Judicial Court of Massachusetts struck down the cable statute.

the Massachusetts inverse condemnation statute overrules the reported cases. Rather, after only a cursory discussion, it chose not to "probe the point" (A-25), despite this Court's holding in *Salve Regina College* v. *Russell*, 111 S.Ct. 1217, 1221-22 (1991) (federal circuit court should decide state law questions de novo, giving independent consideration to whether district court's analytical sophistication exhausted state law inquiry).[8]

Moreover, the important issue in the second question of the certiorari petition is not whether respondents' interpretation of Massachusetts' inverse condemnation statute overrules an unbroken chain of state cases that refuse a damages remedy. Rather, the issue is what should the federal court do when asked to declare whether local legislation takes property without providing just compensation, and the state courts have historically remedied such takings by voiding the legislation, not by allowing affected property owners to recover damages. Should the federal court declare the validity of the statute, or should the federal court dismiss the suit because the property owner has not brought a precedent-breaking suit for damages in state court? If only declaratory relief is sought, is prior resort to a state court damages suit necessary at all, even if the federal court construes state law as providing a damages remedy?

There are other important federal questions subsumed within the question presented by the petition. For example, if the constitutionality of the legislation turns not only on whether the legislation takes property but on whether there is a certain and adequate procedure for obtaining compensation, can the federal court declare that the legislation may not constitutionally stand absent the payment of compensation, without declaring whether the government has provided a constitutionally adequate procedure for obtaining compensation? If the federal court should not declare whether the legislation

[8] The district court did not give any reasons for adopting respondent's construction of the Massachusetts inverse condemnation statute (see A-49).

takes property within the meaning of the Fifth Amendment unless it also declares whether the alleged procedure for obtaining compensation is constitutionally adequate, can the federal court declare whether the alleged procedure is constitutionally adequate without requiring the property owner to exhaust it? If exhaustion is required, what showing must there be that the procedure even exists before exhaustion will be required?[9] All of these important federal questions are presented by the petition, and their resolution does not depend on this Court determining whether respondents' interpretation of the inverse condemnation statute is correct.

Conclusion

For the foregoing reasons, as well as the reasons presented in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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[9] Respondents mistakenly view this as a burden of proof issue, relying on Justice O'Connor's statement in her concurring opinion in *Hudson* v. *Palmer*, 468 U.S. 517, 539 (1984) that the claimant must "prove that available remedies are inadequate." The statement presupposes the existence of remedies, which must be established before reaching the question of adequacy.